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Shariff bin Kadir v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO K–05–52 OF 1997

GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND MOHD GHAZALI JJCA

9 SEPTEMBER 2002

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Criminal Law *— Dangerous Drugs Act 1952 — s 39B — Trafficking — Whether presumption of possession under s 37(d) can be used to invoke presumption of trafficking under s 37(da) — Whether court should carry out a separate exercise under s 37(da) when determining whether an accused is found in possession — Whether presumption of possession under s 37(d) separate and distinct from phrase 'found in possession' in s 37(da) —*

C *Dangerous Drugs Act (Malaysia) s 37(d) and (da)*

Criminal Procedure *— Sentence — Dangerous drugs, possession of — Appropriate sentence*

D ***Evidence*** *— Presumption — Drug trafficking — Presumption of trafficking invoked upon a presumption of possession — Whether case a fit and proper case to apply proviso to s 60(1) of the Courts of Judicature Act 1964*

The appellant was convicted in the High Court of an offence under s 39B of the Dangerous Drugs Act 1952 ('the Act') and sentenced to mandatory death. He appealed to the Court of Appeal. On appeal, it

E was clear that the High Court had offended the rule against double presumption. It had invoked a presumption of possession to raise a presumption of trafficking in order to convict the appellant. The deputy public prosecutor however urged the Court of Appeal to invoke s 60(1) of the Court of Judicature Act 1964.

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Held, allowing the appeal but substituting a conviction under s 6 read with s 39A(2) of the Act:

(1) The High Court had clearly offended what has come to be known as the 'rule against double presumption' — the short hand

G description for the principle established in the case of *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273. What the rule requires is that a trial judge should carry out a separate exercise under s 37(da) when determining whether an accused is found in possession. In other words, the presumption of possession under

H s 37(d) is separate and distinct from the phrase 'found in possession' appearing in the prescription created by s 37(da) of the Act (see p 207B–D); *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 followed.

(2) Having regard to the particular facts and circumstances of the instant case, the Court of Appeal was of the view that it would be

I unsafe for it to invoke the proviso to s 60(1) of the Court of Judicature Act 1964. The substance of the evidence did not warrant it. The appellant's conviction under s 39B of the Act could not

therefore stand and ought to be quashed and substituted with a conviction under s 39A(2) of the Act (see p 207E–F). A

(3) This was a very serious offence and taking into account all the relevant material, including the age of the appellant and other elements of mitigation operating in his favour, a term of 20 years' imprisonment from the date of the appellant's arrest ought to be imposed. No whipping was imposed due to the appellant's age (see pp 207I–208A). B

[Bahasa Malaysia summary

Perayu telah disabitkan di Mahkamah Tinggi kerana satu kesalahan di bawah s 39B Akta Dadah Berbahaya 1952 ('Akta tersebut') dan telah dijatuhkan hukuman mati mandatori. Beliau telah merayu ke Mahkamah Rayuan. Semasa rayuan, ia jelas bahawa Mahkamah Tinggi telah melanggar kaedah anggapan berganda. Ia telah menggunakan satu andaian milikan untuk menimbulkan satu andaian pengedaran bagi tujuan menyabitkan perayu. Timbalan pendakwa raya bagaiamanapun memohon Mahkamah Rayuan untuk menggunakan s 60(1) Akta Mahkamah Kehakiman 1964. C D

Diputuskan, membenarkan rayuan tersebut tetapi menggantikannya dengan satu sabitan di bawah s 6 dibaca bersama s 39A(2) Akta tersebut: E

(1) Mahkamah Tinggi dengan jelas telah melanggar apa yang dikenali sebagai 'rule against double presumption' — perihal ringkas prinsip yang telah ditetapkan dalam kes *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273. Apa yang kaedah tersebut kehendaki adalah di mana seorang hakim perbicaraan patut membuat satu perlaksanaan berasingan di bawah s 37(da) apabila menentukan sama ada seorang tertuduh didapati memiliki dadah. Dalam erti kata lain, andaian milikan di bawah s 37(d) adalah berasingan dan berbeza daripada istilah 'found in possession' dalam preskripsi yang dibentuk oleh s 37(da) Akta tersebut (lihat ms 207B–D); *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 diikut. F G

(2) Setelah mengambilkira fakta-fakta dan keadaan-keadaan kes semasa, Mahkamah Rayuan berpendapat bahawa ia tidak selamat untuk menggunakan proviso kepada s 60(1) Akta Mahkamah Kehakiman 1964. Keterangan yang kukuh tidak mewarankannya. Sabitan perayu di bawah s 39B Akta tersebut tidak boleh dengan itu kekal dan patut dibatalkan dan digantikan dengan satu sabitan di bawah s 39A(2) Akta tersebut (lihat ms 207E–F). H

(3) Ini merupakan satu kesalahan yang amat serius dan setelah mengambilkira kesemua fakta penting, termasuklah umur perayu dan elemen-elemen peringanan lain yang berpihak kepadanya, satu tempoh penjara selama 20 tahun daripada tarikh perayu I

A ditangkap patut dikenakan. Tiada sebatan dikenakan oleh sebab umur perayu (lihat ms 207I–208A).]

[*Editorial Note*: The respondent has filed an appeal to the Federal Court vide Civil Appeal No 05–67 of 2002(K).]

B **Notes**

For cases on Dangerous Drugs Act 1952 s 39B, see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 126–149.

For cases on presumption of drug trafficking, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1840–1843.

C For cases on sentence for drug possession, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3060–3065.

Cases referred to

Muhammed bin Hassan v PP [1998] 2 MLJ 273 (folld)

D

Legislation referred to

Court of Judicature Act 1964 s 60(1)
Dangerous Drugs Act 1952 ss 37(d), 37(da), 39A(2), 39B

E **Appeal from:** Criminal Trial No 45–2 of 1996 (High Court, Alor Setar)

G Ravishankar (*R Shankar Gandhi & Assoc*) for the appellant.
Kamal Baharin bin Omar (Deputy Public Prosecutor) (Attorney General's Chambers) for the respondent.

F **Gopal Sri Ram JCA** (delivering judgment of the court): The appellant before us was convicted of an offence under s 39B of the Dangerous Drugs Act 1952 ('the Act'). The mandatory sentence prescribed by law was imposed on him. The facts which form the foundation of the case against the appellant are in the main undisputed and may be shortly stated.

G PW3, a detective corporal acting as an agent provocateur made contact with the appellant. They had several meetings. From the evidence, it transpired that they met about four times. This is how PW3 describes this meeting:

H Pada 14 November 1994 jam lebih kurang 11 pagi, saya sekali lagi pergi ke kawasan Kota Kuala Muda, iaitu di kawasan Kampung Sungai Derhaka. Apabila sampai, saya pergi ke rumah laki-laki yang bernama Namat. Saya berjumpa dengan lelaki yang bernama Namat itu dan memperkenalkan diri saya sebagai 'Osman' yang datang dari Taiping. Saya pelawa kepada lelaki itu akan hajat saya untuk membeli sejumlah ganja daripadanya. Dia beritahu saya bahawa pada ketika itu dia tidak mempunyai ganja yang saya kehendaki. Dia minta tempoh sedikit hari untuk dia dapatkan pertolongan kawannya untuk

I dapatkan ganja itu. Saya pun setuju. Saya pun balik. Sebelum balik saya beritahu Namat yang saya akan datang semula ke rumahnya. Saya boleh cam orang yang bernama Namat ini. [Tertuduh dicam].

Pada 28 November 1994 jam lebih kurang 11.30 pagi, saya pergi semula ke Kampung Sungai Derhaka. Saya bertemu semula dengan tertuduh. Saya jumpa tertuduh di tepi jalan. Saya ada berbual dengan dia. Saya bertanyakan bekalan ganja yang saya pesan tempoh hari. Dia kata dia belum dapat lagi berhubung dengan kawan yang dia maksudkan, dan bekalan ganja itu belum ada dalam simpanannya. Saya pun balik.

Pada 23 Januari 1995 jam lebih kurang 11 pagi, saya sekali lagi pergi ke kampung itu dan bertemu dengan tertuduh. Saya pergi ke rumah tertuduh dan bertanyakan bekalan ganja yang saya pesan itu. Tertuduh sekali lagi beritahu yang bekalan ganja itu belum dapat diadakan. Dia berjanji kepada saya akan cuba dapatkan bekalan itu. Tertuduh meminta tempoh sedikit hari lagi. Sebelum saya balik, tertuduh beri nombor telefon rumahnya kepada saya. Tertuduh minta saya hubunginya dengan telefon. Saya pun balik.

Pada 21 Februari 1995 jam lebih kurang 3 petang, saya menalipon tertuduh. Saya dapat berbual dengannya melalui telefon. Saya sekali lagi bertanya kepada tertuduh tentang bekalan ganja yang saya pesan tempoh hari. Tertuduh telah beritahu saya bahawa beliau telah mendapat bekalan ganja yang dipesan dari kawannya untuk diberikan kepada saya. Tertuduh meminta saya datang ke Kota Kuala Muda dan saya bersetuju. Saya beritahu tertuduh yang apabila saya sampai di Kota Kuala Muda saya akan menghubunginya dengan talipon. Tertuduh setuju dengan cadangan saya. Saya meminta tertuduh yang saya menghendaki ganja sebanyak 20 kilo. Tertuduh setuju. Saya ada tanya harga. Harganya ialah RM1,200 untuk satu kilo.

Saya minta tertuduh kurangkan harga itu. Tertuduh tidak beritahu apa-apa apabila saya minta kurangkan harga. Saya berjanji dengan tertuduh yang saya akan sampai pada malam itu.

As may be seen, the last communication between the appellant and PW3 resulted in an arrangement for them to meet. Following this conversation, PW3 briefed his superior, PW4, who took steps to arrange an ambush for the purpose of apprehending the appellant. At the arranged time, PW3 met the appellant who asked the former to follow him. PW3 did so. A distance away from the scene of the meeting PW3 entered a lane, pointed out to him by the appellant who thereafter followed him on foot. After travelling a short distance, PW3 noticed that the appellant was missing. PW3 then saw the appellant carrying something in his hand emerging from another lane. PW3 then accelerated his car and moved away. Almost immediately thereafter PW4 and the police party accompanying him emerged and apprehended the appellant. On apprehension, it was discovered that the appellant was carrying a sack containing what subsequent chemical analysis proved to be 12,793g of cannabis.

At the trial of the appellant, the prosecution contended that it had established a case of trafficking based on the fact that the appellant had been found in possession of the proscribed drug. In short, the prosecution relied on the presumption under s 37(d) read together with s 37(da). To put in another way, it was the prosecution's argument that the appellant had custody or control of the drug in question and was therefore in presumed possession (s 37(d) of the Act) so that he was found in possession and hence guilty of trafficking (s 37(da) of the Act). The learned deputy who has very ably responded to this appeal, has frankly conceded that this was the tack of

A the prosecution case in the court below. The learned judge accepted this as reflected in the following passage in his judgment, drawn to the learned deputy's attention by our learned brother, Mohd Ghazali JCA:

> At the close of the case for the prosecution, after listening to submissions, I was satisfied that the prosecution had succeeded in proving beyond reasonable
B doubt that the accused had in custody or under his control the seven packages containing the cannabis and therefore the dual presumptions under section 37(d) and section 37(da)(vi) of the DDA apply.

Now this is a clear misdirection in what otherwise is a very well written and carefully considered judgment. It offends what has come to be known as 'the rule against double presumption'. That is the short hand description for
C the principle established in the case of *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273. What the rule requires is that a trial judge should carry out a separate exercise under s 37(da) when determining whether an accused is found in possession. In other words, the presumption of possession under s 37(d) is separate and distinct from the phrase 'found
D in possession' appearing in the prescription created by s 37(da) of the Act.

The learned deputy has eloquently argued that we ought not nevertheless to intervene because this is an appropriate case where the proviso to s 60(1) of the Court of Judicature Act 1964 may be safely invoked. The learned deputy must forgive us if we find ourselves unable to accept this submission.

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As pointed out by our learned brother Abdul Kadir Sulaiman JCA in the course of argument, this is a case in which the prosecution had plainly failed to prove anything more than negotiations. Additionally, there was some evidence that the drug came from a friend of the appellant. Having regard to the particular facts and circumstances of this case, we are of the
F view that it would be unsafe for us to invoke the proviso. The substance of the evidence simply does not warrant it.

It follows therefore from what we have said thus far, that the appellant's conviction under s 39B cannot stand. It is quashed. In its place, we would substitute a conviction under s 6 read with s 39A(2) of the Act.

G Having heard arguments from counsel for the appellant and the learned deputy public prosecutor, we are of the opinion this is a very serious offence. Quite properly, learned counsel for the appellant had not sought to water down the seriousness of the offence committed by his client or the circumstances in which it was committed.

In passing sentence, we are duty bound to give paramount
H consideration to public interest. We note the rampant commission of offences such as the present despite the vigilance of the police and untiring efforts by the elected Government to stamp out drug related offences.

We will be failing in our duty, if we did not, when passing sentence reflect the gravity of the offence in which the appellant has been convicted.

I Having taken into account all the relevant material before us, including the age of the appellant and other elements of mitigation operating in his favour, we would impose a tenure of 20 years imprisonment which is to take

effect from the date of the appellant's arrest. Because of his age, no sentence of whipping may be passed on the appellant.

Before concluding, we would record our appreciation for counsel for the appellant and the learned deputy public prosecutor without whose assistance this oral judgment would not have been possible. This appeal is allowed.

Appeal allowed and substituted a conviction under s 6 read with s 39A(2) of the Act.

Reported by Andrew Christopher Simon